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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 569

GENERAL FOODS CORPORATION, HUNT FOODS, INC. and MORTON SALT COMPANY,

Petitioners,

vs.

STATE WHOLESALE GROCERS, ZEIGMUND WHOLESALE GROCERY CO., INC., RALPH C. BERG, D/B/A BERG'S FOOD STORE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

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DANIEL WALKER.

December 29, 1958

Patrick Press, Inc., 74 Trinity Place, New York 6, N. Y. U. S. A.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Great Atlantic and Pacific Tea Company (hereinafter "A&P") respectfully moves the Court for leave to file the annexed brief in support of the petition of General Foods Corporation, Hunt Foods, Inc. and Morton Salt Company for the grant of a writ of certiorari.

Woman's Day was founded in 1937 by a wholly-owned publishing subsidiary of A&P. It has become one of the leading national magazines.

> *Woman's Day* is of comparable content and quality with such other women's service magazines as *Good Housekeeping*, *Ladies Home Journal* and *McCalls* and has won national awards for its accomplishments in editorial, art and homemaking fields.
>
> Over 3,300,000 copies are purchased each month. For 14 years it has been among the top 10 magazines in paid circulation.
>
> Over 350 manufacturers of national brand products (of whom over half are manufacturers of products not of the type sold in A&P stores) each year advertise in one or more of the monthly issues of *Woman's Day*. Their payments have placed it for 14 years among the top 25 magazines (more recently in the top 12) in advertising revenue.

The propriety of this venture by A&P was questioned for the first time in 1956 when this treble-damage action was instituted as a spurious class suit in behalf of the over 13,000 retailers and wholesalers of grocery products in the Chicago Metropolitan Area and against A&P, Woman's Day, Inc., the magazine's publisher, and three advertisers, the present petitioners.

Plaintiffs-respondents abandoned either before trial or upon appeal their charges of violation of Sections 1 and 2 of the Sherman Act and of Sections 2(a) and 2(f) of the Robinson-Patman Act. The District Court's judgment dismissing the complaint thus stands affirmed with respect to A&P and Woman's Day, Inc. The Court of Appeals held, however, that the advertising payments to Woman's Day, Inc. made by petitioners violated Section 2(d) of the Robinson-Patman Act and reversed and remanded with respect to them.

A&P has a substantial and continuing interest in review by this Court of the decision below.

> The decision as it has been interpreted so adversely affected the advertising revenues of Woman's Day, Inc. as to compel A&P to dispose of its interest. Such an interpretation will inhibit the creation by retailers, including A&P, of new and different enterprises to compete for the patronage of all, including those with whom the retailer may also have the relationship of customer and supplier.

What happened to *Woman's Day* following the decision below demonstrates the point. Grocery product advertising is a major and essential factor for any women's service magazine. Many grocery product manufacturers were unwilling to run the risk of suit (which they found implicit in the decision whatever the method of operations of *Woman's Day* so long as A&P retained its interest in the publisher) by continuing to advertise in *Woman's Day*, particularly when the number of possible retailer plaintiffs was legend. This practical concern of advertisers and their advertising agencies and its effect upon *Woman's Day* compelled A&P to dispose of its stock in Woman's Day, Inc.

A&P submits that questions essential to the decision of this case are:

> 1. What is a "service or facility" within the meaning of the Robinson-Patman Act?
>
> 2. Did petitioners pay for such a service or facility?

The nature of "service or facility" under the Act is a question of significance to all retailers and manufacturers. For *Woman's Day* in this case, can be read other enter-

prises created by retailers and patronized by their suppliers. It is an important question of federal law which has not been, but should be settled by this Court.

The annexed brief (to the filing of which respondents have declined to consent) treats of the "service or facility" question as a reason for granting the writ without repetition of what is said by petitioners and independently of the important reasons they put forward.

Respectfully submitted,

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The Interest of A&P.

The interest of A&P in review by this Court of the decision below is:

(1) as the creator of a twenty-year old publishing enterprise whose advertising revenues were adversely affected by the decision; and

(2) as one of those who may be inhibited by the interpretation which has been given to the decision in creating or patronizing new enterprise if the two

parties to a transaction involving the new enterprise also deal with each other as supplier and customer.

The District Court Decision.

The District Court (Campbell, D. J.) dismissed the complaint (154 F. Supp. 471 and Appendix to Appellants' Brief 160). It held that the advertising payments of petitioners did not "furnish" *Woman's Day* in violation of Section 2(e) of the Robinson-Patman Act (49 Stat. 1526 (1936), 15 U. S. C. §13(e) (1952)). Rather, so the court found, the success of *Woman's Day* depended upon the expertise of its publisher in providing editorial content appealing to readers which in turn made it of value as an advertising medium.

The District Court also held that the advertising payments did not violate Section 2(d) because it found that the shopper demand created by the national brand advertisements was satisfied in all grocery stores with only incidental benefit to A&P as one retailer and that the payments did not result in the shifting of a substantial portion of A&P's advertising costs as a retailer to the advertisers.

The District Court's decision was based upon analysis of the legislative history of the Sections and 183 detailed findings of fact.

The Court of Appeals Decision.

The Court of Appeals majority (Major and Schnackenberg, C. J.; Finnegan, C. J., dissenting) (258 F. 2d 831 and Appendix to Petition 21) agreed with the District Court that the advertising payments did not "furnish" the magazine under Section 2(e).

The court held, however, that the payments had been made in violation of Section 2(d). Its conclusion insofar as relevant to this brief paraphrases the Section as follows:

> "The defendant suppliers paid, and contracted to pay, money to Woman's Day, Inc., a controlled subsidiary of A&P, for advertising in a magazine furnished by A&P in connection with the sale of products manufactured, sold, or offered for sale by said suppliers. §2(d) made that transaction unlawful . . ." (App. 32).

The Court of Appeals did not mention the legislative history, but rather referred to Section 2(d) as establishing a "rigid definition" (App. 31). Without discussion it found certain unspecified facts contrary to the findings of the District Court.

The decision leaves in doubt whether the conclusion of the Court of Appeals was reached by reason of a construction of Section 2(d) as applicable to all transactions between suppliers and their customers or upon the particular facts here involved.*

Summary of Argument.

The decision below has been interpreted as construing Section 2(d) to apply to all supplier-customer transactions simply because that relationship also exists. It thus poses an important question not heretofore considered by the Court—

> What is the nature of the services and facilities to which the restrictions of Section 2(d) and its companion Section 2(e) apply?

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* A petition for rehearing was denied (Finnegan, C. J., dissenting (App. 41) as was a petition for rehearing *en banc* (Duffy, Chief Judge, and Finnegan, C. J., dissenting) (App. 40).

This question should be resolved by construing the Sections to apply only where the "service" is such that in paying for it or furnishing it a supplier significantly aids a customer in the performance of the customer's own merchandising or distribution functions—not where the supplier in performing his own functions deals with an autonomous enterprise created by a customer. Such a test is to be derived from the terms and legislative history of the Sections.

The decision is erroneous when the record is read in the light of this construction of the Sections.

Argument.

The Important Question Posed by the Decision Below.

The Court of Appeals majority stated the naked conclusion that for a manufacturer whose products were sold by A&P to pay for advertisements in *Woman's Day* constituted a transaction covered by Section 2(d) of the Robinson-Patman Act.

The incidents of the transaction which led to this result are not specified or explained. Indeed, the decision contradicts itself in stating the transaction considered by the court to be involved—a payment "for the advertisement" and therefore not in violation of Section 2(e) (App. 31), yet a payment "for advertising in a magazine" and therefore in violation of Section 2(d) (App. 32).

The decision's absolutist conclusion, the ambiguous reference to a "rigid definition" in Section 2(d) with emphasis upon the "*fact* of paying" (App. 31) and the absence of discussion all create ambiguity. No reference is made to the legislative history which all the parties agreed and the District Court held was of determinative importance.

Ambiguity in turn lends itself to the pernicious interpretation that all transactions between suppliers and their customers come within the restrictions of Section 2(d), or of Section 2(e), simply because the supplier-customer relationship also exists.

This interpretation has been placed upon the decision. Many advertisers of grocery products whose advertising is essential to a women's service magazine were unwilling to advertise in *Woman's Day* so long as A&P retained an interest in the magazine's publisher despite changes in its operation which eliminated the features upon which plaintiffs-respondents had relied. In the advertisers' view the decision created a risk of suit which they were unwilling to run. A&P was forced to dispose of its interest.

The interpretation which has been placed upon the decision extends the application of the Sections beyond any previous case. The creation of new enterprise is inhibited —indeed in practice forbidden to those who already either buy or sell. Freedom of entry is restricted, and Sections 2(d) and 2(e) are placed in conflict with the body of antitrust law of which they are a part and in the light of which the Robinson-Patman Act is to be construed. *Automatic Canteen Co.* v. *Federal Trade Comm'n.*, 346 U. S. 61, 74; *Standard Oil Co. (Indiana)* v. *Federal Trade Comm'n.*, 340 U. S. 231, 248-249.

Heretofore, this Court has not had occasion to draw a distinction between those transactions which come within the Sections and those which do not—between cooperative merchandising allowances and services, on the one hand, and a manufacturer's patronage of an autonomous enterprise created by a retailer, on the other. In *Corn Products Refining Co.* v. *Federal Trade Comm'n.*, 324 U. S. 726, for example, the manufacturer had advertised the candy sold by one customer alone as containing the manufacturer's dextrose.

In the *Elizabeth Arden* cases, *cert. denied,* 326 U. S. 773 and 331 U. S. 806, the manufacturer paid all or a portion of the salary of a retailer's sales-clerk to act as a demonstrator of the manufacturer's cosmetics. There could be little question concerning the nature of the transaction. The dispute centered on other issues.

Here, the nature of the transaction—whether it was payment for a service or facility within the meaning of the Sections—is an essential issue which should be resolved by this Court.

How this issue should be resolved and the result contrary to that below which its proper resolution would compel, in A&P's submission, is briefly outlined in the remainder of this brief.

The Proper Construction of Sections 2(d) and 2(e).

A&P submits that there is a fundamental distinction which needs to be drawn—and is required by the terms, history and prior application of Sections 2(d) and 2(e)—between those transactions between supplier and customer which are proximately connected with the performance of the customer's functions *qua* customer and those which are proximately connected with some other enterprise, here the publication of a magazine, which the supplier or customer has created.

A&P urged below that Sections 2(d) and 2(e) apply only to a specific practice—supplier assistance (either by a payment or the furnishing of some physical help) to a customer in the customer's distribution or merchandising ("processing, handling, sale, or offering for sale") of the product which the customer has purchased.

The test is whether the supplier is contributing to a "service or facility" which is both:

(i) in connection with the customer's own distribution or merchandising of the particular product and thus inherently the customer's, not the supplier's, function to perform; and (ii) of direct and significant, rather than incidental, benefit to the customer in that the customer is enabled to shift a substantial portion of his own distribution or merchandising costs to the supplier.

Nature of the practice—The specific practice has been recognized. It is known as "cooperative merchandising" which it has been said the Sections were enacted to regulate. Dunn, "Sections 2(d) and (e)", CCH *Robinson-Patman Act Symposium* 55 (1946).

The distinction in nature and purpose between "cooperative merchandising" where the manufacturer contributes to retailer advertising, on the one hand, and manufacturer brand advertising, on the other, has been described by the Federal Trade Commission in its *Report on Distribution Methods and Costs: Part V: Advertising as a Factor in Distribution* (1944).

In the former, manufacturers contribute to retailer advertising with its emphasis upon the prices, services and identity of the retailer, its featuring of brands as a means of attracting trade to the retailer's place of business and its use of local newspaper advertisments, hand bills, in-store displays, etc.; manufacturers do so to have some control over retailer advertising of their products (*Report* at 16). In the latter, in order to create general consumer demand, manufacturers advertise their own products under their brand names and typically without reference to price or where the product may be purchased; they place their advertisements in national media, (*Report* at 2, 9-10).

One is supplier assistance to a customer in performing the customer's own functions. The other is performance

by the supplier of his own functions, and it should not matter that the medium the supplier chooses happens to be the product of a customer's autonomous enterprise.

Language of the Sections—This economic distinction is expressed in the language of Sections 2(d) and 2(e).

The Sections do not reach payment for or the furnishing of every "service or facility." Congress did not stop short at an all-inclusive definition. It added a significant limiting phrase.

The service or facility must be "in connection with" (Section 2(d)) or "connected with" (Section 2(e)). The connection must be with "processing, handling, sale, or offering for sale" by the customer (of the product "manufactured, sold, or offered for sale" by the supplier [Section 2(d)] or "bought for resale" and "so purchased" by the customer [Section 2(e)]).

Similarly, the phrase "proportionally equal terms" assumes that the service is an element of a customer function and that consequently competing customers having similar functions to perform are by hypothesis on a proportionally equal footing.

Again, in defining competing customers the focus is on those who are competing "in the distribution" (Section 2(d)). The term "discrimination" in Section 2(e) makes the same point since, as explained by Congressman Utterback who introduced the Section, it means a difference between those whose relationship is such that they are entitled to comparable treatment, e.g., those who are competing "in the resale" of the product concerned. 80 Cong. Rec. 9416 (1936).

Legislative history—All parties and the District Court recognized that the legislative history of the Sections is vital to decision.

The specific practice which Congress intended to prohibit is explicitly defined under the heading "Service Allow-

ances" in both the Senate and House Committee Reports as follows:

> "Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case *the customer is deriving* from it *equal benefit to his own business* and *is thus enabled to shift to his vendor substantial portions of his own advertising cost*, while his smaller competitor, unable to command such allowances, cannot do so." S. R. No. 1502 at 7, H. R. No. 2287 at 15-16, 74th Cong. 2nd Sess. (1936) (emphasis supplied).

Senator Logan, who submitted the Senate Report, described such services as "those to be rendered by the buyer in the resale of goods which he has purchased from the manufacturer"; he pointed out that such allowances are paid customers "for doing only what they must do in any case for their own advantage and profit" 80 Cong. Rec. 6257 (1936).

The legislative history confirms that Sections 2(d) and 2(e) were intended to apply to assistance by a supplier of more than incidental benefit to the customer in connection with the customer's performance of what is inherently his function to perform in reselling the products he has purchased. The customer receives such a benefit "to his own business" from the service for which the supplier pays in the sense that "substantial portions of [the customer's] own advertising cost" are shifted to the supplier.

Prior application—The cases have previously refused to extend the application of Section 2(d) and 2(e) to transactions between supplier and customer merely because the transaction could be said to relate in some manner to products sold by the supplier to the customer and to be of some incidental benefit to the customer.

Skinner v. *United States Steel Corp.*, 233 F2d 762 (5th Cir. 1956)

(supplier made payroll deductions from its employees' wages to cover their purchases on credit from a retailer-customer; *held* not a "merchandising service" with respect to a "specific commodity").

American Can Co. v. *Russellville Canning Co.*, 191 F2d 38 (8th Cir. 1951)

(supplier paid one customer a "runway allowance" since the adjoining location of customer's plant permitted delivery by runway; *held* not a payment for a service).

Chicago Seating Co. v. *S. Karpen & Bros.*, 177 F2d 863 (7th Cir. 1949)

(supplier quoted a special line of his products to some but not all of the customers for his regular line with the result that some customers were prevented from bidding on contracts for which the supplier had arranged the specifications; *held* that the quoting of prices on the special line was not a service but rather an invitation to negotiate).

General Foods Corp., FTC Dkt. No. 6018, CCH Trade Reg. Serv. Par. 25, 888 (1956)

(supplier paid for the delivery services of certain customers; *held* that the payments were not "made to the [customer] as a customer" and "not made in connection with the resale of goods bought by him").

These cases establish that not every transaction between supplier and customer comes within Sections 2(d) and 2(e) and that the Sections must be applied only to the transactions at which they are directed.

The other cases which have arisen under Sections 2(d) and 2(e) involved services which, as the District Court said (App. 59), were "inherently discriminatory" and "primarily designed to benefit only the customer".

The proper distinction between supplier assistance to a customer *qua* customer and supplier patronage of an enterprise provided by a customer in another capacity is not novel. It has long since been indicated by this Court's decisions under the provisions of the Interstate Commerce Act which prohibit carrier discrimination between shippers but permit carriers to employ and pay for the "transportation" services of shippers.* See *Tap Line Cases*, 234 U. S. 1, *United States* v. *Baltimore & O. RR*, 231 U. S. 274 and *Interstate Commerce Comm'n.* v. *Diffenbaugh*, 222 U. S. 42, where the carrier made use of the services of shippers as, respectively, a tap line owner, a freight terminal operator and a grain elevator operator.

The Instant Record.

If the suggested construction of Sections 2(d) and 2(e) is correct it becomes necessary to judge the record in its light.

The case was submitted to the District Court on a record consisting of 181 printed pages of stipulations and more than 1,000 exhibits. The District Court, having "carefully considered all of the evidence" made 183 detailed findings of fact, 154 F. Supp. 471, 485-506 and Appendix to Appellant's Brief 186-227. The Court of Appeals without discussion, analysis or even identification found "certain facts . . . contrary to some found by the district court" (App. 23).**

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* Sections 2, 3 and 15 (13), 24 Stat. 379, 380, 384 (1887) as amended 49 U. S. C. §§ 2, 3, 15 (13) (1952).

** It has been estimated that if the case had not been submitted on a stipulated record, the trial time would have been six months

The new findings appear to be the court's statements concerning *Woman's Day*. (The court's reasoning that the petitioners did not furnish *Woman's Day* because they were "simply buying an advertisement" and the non-discriminatory character of the advertisements are discussed in the petition, and the discussion will not be repeated here.) In one short paragraph the court described *Woman's Day* as an effective advertising medium for A&P, as creating good will among A&P customers, as attracting and keeping customers, as a promotional operation, and finally as existing "solely" for A&P's competitive benefit (App. 25).

It is significant that the court's staccato description begins as an opinion of results and culminates as an ascription of intent. Yet, the court carefully held that motive and intent are irrelevant (App. 31-32).

The determinative issue, if it be assumed *arguendo* that the magazine not the advertisements was that for which petitioners paid, is the competitive effect of *Woman's Day*. Was this successful national magazine a promotional operation existing solely for A&P's competitive benefit as a retailer? Did it in fact have an impact on sales, was it

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requiring the testimony of perhaps 200 witnesses. *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges*, 21 F. R. D. 395, 499 (1957). This very virtue of a stipulated record, however, in the Court of Appeals' view (App. 22) gave it freedom to brush aside what the District Court had done. This Court did not in *United States* v. *E. I. du Pont & Co.*, 353 U. S. 586, 598-606 (cited by the court below) reverse the lower court's findings without carefully and at length pointing out where the conclusion erred. The same cannot be said of the instant decision. The effect will be to discourage both the use of a stipulated record in the presentation of cases which would otherwise require protracted trials and the making of detailed findings by the trial court in cases where a stipulated record is used. It is submitted that some weight—whether the formula is that of Rule 52(a) or not—should be given by the reviewing court to findings in such a case and that the problem exemplified by the instant decision calls for the exercise of this Court's power of supervision. See Judge Hand's discussion in *United States* v. *Aluminum Co. of America*, 148 F. 2d. 416, 433 (2d Cir. 1945).

a traffic builder, could it be isolated as a significant competitive factor?

The plaintiffs-respondents, whose burden of proof it was, failed to introduce any evidence that their customers had been diverted to A&P. Significant as showing their opinion of the competitive value of a store-distributed magazine is the fact that a majority of the 17 retailer-respondents who had such a magazine (*American Family* or *Better Living*) available to them never carried it and others only did so for short periods (Appellants' Appendix 216-219).

The uncontradicted and objective evidence of the absence of competitive impact of *Woman's Day* was adduced by A&P and Woman's Day, Inc.

> Comparative statistics of A&P sales and *Woman's Day* circulation showed no relation between the two (Appellants' Appendix 208).
>
> An independent survey of shoppers at the A&P stores near the stores of plaintiff-respondents showed that only 23 of the 4,602 shoppers interviewed gave *Woman's Day* or "A&P magazine" (which might have meant other magazines sold in the store) as a reason for shopping at A&P. This reason figured only this minimal number of times among the total of 9,621 reasons given. (Appellants' Appendix 208-211)

The District Court held that the record was "absolutely devoid of any evidence that *Woman's Day* was created for any purpose other than for legitimate business reasons" (Appellant's Appendix 184).

The District Court found that:

> "Woman's Day, Inc. is operated as a legitimate business enterprise. Its business is that of publishing a magazine to be sold on its own merits as a magazine" (Appellants' Appendix 195).

"The distribution of *Woman's Ddy* in A&P stores has no immediate impact on the sales of those stores" (Appellants' Appendix 213).

"*Woman's Day* cannot be isolated as a factor causing persons to shop at A&P stores" (Appellants' Appendix 214).

"There is no evidence that any plaintiff has lost sales or customers or profits as a result of the distribution of *Woman's Day* by A&P stores" (Appellants' Appendix 225).

A&P submits that examination of the record will show that *Woman's Day* was not of direct and significant benefit —of more than incidental benefit—to A&P in connection with the performance of its merchandising function as a retailer.

Conclusion.

It is submitted that for the reason herein set forth and for the reasons stated in the petition, the writ of certiorari prayed for should issue.

Respectfully submitted,

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